No. 508.

By S. F. Leib for

Office Supreme Court U. S.
FILED
JAN 13 1902
JOSEPH H. McKENNEY,
Clerk

Filed Jan. 13, 1902.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 508.

TULARE IRRIGATION DISTRICT, ET AL.,
PLAINTIFFS IN ERROR,

vs.

ALFRED SHEPARD, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

S. F. LEIB,
Attorney for Defendant in Error.

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The briefs and record are being printed at the same time and about three thousand miles apart. They will be completed barely in time for submission of the case within the first ninety days of the term (all parties being desirous of an early decision), so the record is not available for the citation of its pages in making up an index of facts.

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IN THE

Supreme Court of the United States

TULARE IRRIGATION DISTRICT, GEORGE G. KELLEY, AND G. GARIBALDI, Executor of the Last Will of B. W. Jauchius, deceased,
PLAINTIFFS IN ERROR,

vs.

ALFRED SHEPARD, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The simple statement of this case should be a complete answer to the writ of error.

Water is the life blood of California. Without it, much of the State would be an arid waste. With it, the desert places have been made to overflow with abundant fruitfulness. Hardly any place in the State, no difference where situated, that is not greatly benefited by it. But water must be brought from great distances,

sometimes twenty miles or more. Large expenditure to that end is necessary. Bodies of land, tens of thousands of acres in extent, the richest the sun ever shown upon, were in sore need of it. The investment to bring water to his land was entirely beyond the reach of any one owner; but if he could have water, plenty and abundant, his land would be rendered much more valuable.

In view of this crying necessity, the "Wright" act was passed in 1887 by the Legislature of California, the act taking its name from its author, a prominent lawyer from Modesto. With this act this Court is thoroughly familiar, having declared its constitutionality in the case of Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

The object of this act was to enable the many to do what could not be done as an individual undertaking.

The plan of the law was to form irrigation districts where they were needed, and for that purpose the law provided that a given number of persons might petition the Board of Supervisors for the formation of such district. The petition was to be published in a newspaper, "together with a notice stating the time of meeting at which the same will be presented." It was stated by this Court in the Fallbrook case that something like thirty districts had been organized under this law and had incurred a bonded indebtedness of over eight millions of dollars. The statement is very clearly within the limits of the facts.

One of the very first, probably *the* very first, of

these districts, viz., the Modesto Irrigation District (before this Court in Tregea vs. Modesto Irrigation District, 164 U. S., 179), to be formed, was formed under the legal direction of Mr. Wright himself, the author of the law. The notice attached to and published "with" the petition, he did not have signed by the petitioners. He drew the law and probably thought he knew what it intended, but he did not think it intended that the notice published "with" the petition should be signed. Notices of various kinds of meetings, etc., are constantly seen in the newspapers which are unsigned. He probably intended such a notice when he drew the law. Possibly he had attended funerals with no other information concerning the same than that derived from funeral notices, which are never signed. He allowed no possible misconstruction or doubt to rest in the land owner's mind, however, for he provided in the law that the notice and the petition should be published "*together.*" No one could read the petition and then the notice expressly referring to it, and published "with" it, and have the slightest misinformation or doubt that the petition would be presented at the time mentioned in the notice. It is claimed that every single district in the State except one was organized without the notice being *signed*, and that one disincorporated without issuing bonds; the notice, however, was always published "with" the petition, sometimes preceding it as in the Fallbrook Irrigation District, and sometimes succeeding it as in the Tulare District and the Modesto District, but the notice always expressly referred to the petition and was always published "with" it. So if that be a de-

fect and a defect which will invalidate the bonds of these districts in the hands of innocent purchasers, the entire indebtedness of these districts, amounting to many millions of dollars, will be invalidated. The notice in this case was unsigned, but expressly referred to the "foregoing" petition and was published "with" the petition, as the statute prescribed. The supervisors considered this a good notice and found, *in the very terms of the statute*, that notice was given. If the statute, when it used the word "notice," meant a *signed* notice, then the supervisors, when they found that "notice" was given, found that a *signed* notice was given, for both the legislators and the supervisors used precisely the same word.

The bondholders in this case are innocent purchasers of these bonds, with no notice of any defect whatever.

That the supervisors should have thought this a good notice is not strange. Every taxpayer in the district thought it a good notice, and paid taxes for years to the district. Every lawyer in the State thought it a good notice, until in the case of the Central Irrigation District, 117 Cal., 382, the learned counsel writing the brief on the opposite side of this case was retained in that case, and he discovered and convinced the Court that while the taxpayers of that District had always *thought* that they had had notice, both when they first read it and at all times thereafter, yet, after all, they were mistaken. That case was decided in 1897. In the many cases that had been litigated up to that time in the Supreme Court of California, con-

cerning the validity of these districts, not a single lawyer but thought his clients had *had* notice (not only *in fact*, but in the form that the law required), and not a single taxpayer in those many litigated districts who suggested to his lawyer or even suspected that he had had no notice. It would seem that when practical experience had demonstrated that the object of the statute had been attained, viz.: that information had actually been given by a notice which the taxpayers *thought* was legal, that if after all it was not in strict compliance with the statute, the defect was an irregularity merely, and of the most trifling character at that, which could only be availed of upon a direct attack, if at all. The notice in this case, like the notice in all the cases, was in due form, expressly referred to the petition, and was (as the statute required) published "with" the petition. They were in the same type, and black lines across the column enclosed the two "together." The petition was heard, and all who could show that they should be excluded (and there were a number) *were* excluded; and thereupon the board, in the manner provided by the statute, submitted to the electors of the contemplated district whether they should have a district or not. There were 484 votes cast on this proposition, *all of which were in favor* of forming the district *except seven*. It was practically *unanimous*. Thereupon the Supervisor declared the District formed, and described its boundaries and recorded its order with the County Recorder.

Now, what happened then?

The district being thus organized, *legally*, as it and

everyone else *then*, and for at least five years thereafter, thought, immediately commenced to act as a district in every particular, and has continuously continued to so act *down to this day*. The stipulation in that regard reads as follows:

"The persons declared by said order of the Board of Supervisors to have been elected as officers of said District immediately thereafter purported to organize as such officers, and thereupon entered upon their duties as such officers the same as though said District had been legally organized, and as though they had been legally elected such officers, and they and their successors in office have ever since continued to act as such officers and to maintain the name of "Tulare Irrigation District," and in its name have caused the defendant to act as though it was in every respect legally organized as an irrigation district, under said act of the Legislature, and in that behalf has at all such times had the name "Tulare Irrigation District" printed upon a sign above a door in front of an office in which the archives and papers of said defendant are kept; and its Board of Directors have met from time to time in such room from the time of such purported organization thereof until the present, weekly and sometimes oftener, averaging twice a month, and in the year 1891 1892, 1893, its Board of Directors purported to issue bonds of such Tulare Irrigation District in the sum of $500,000, being 1,000 bonds of the face value of $500 each, as hereinafter stated,and levied assessments on the property claimed to be embraced in said District, purporting to act in so doing under the said act of the legislature, and previous to July 1, 1896, it assessed, levied and collected taxes upon the lands claimed to be in such district of over $100,000 and paid the same out as interest upon such bonds; that it has engaged in litigation as plaintiff in———suits; ———of them,

before the issuance of said bonds, and therein alleged that it was a corporation under the provisions of the said act of the legislature, and from said time of its said purported organization until the present time, whatever it has done and performed, it has done and performed in the same manner as if it had been legally organized as such District in full compliance with the law, and so continues to act and hold itself out as such corporation organized under said law."

Now these districts naturally wanted to sell their bonds at the highest possible price. Capital is proverbally timid and with just reason. No man wants to invest his money on a low security (and 6 per cent was a very low interest in 1887, as low as 4 per cent is now, as will be seen by comparing government bond interest then and government bond interest now) unless he is *sure* to get the principal as well as the interest.

In order that the district should sell its bonds at the highest rates, there must be no contests—no litigation. The "Wright Act" already contained the following provision:

"Said bonds * * * shall be negotiable in form. * * * Said bonds shall express on their face that they were issued *by authority* of this act."

This provision was undoubtedly to bring the bonds within the many decisions of this Court that a negotiable bond with such a recital was conclusive as against all objections to its validity. Still, to make assurance doubly sure: to give these bonds the highest possible market value: to enable the district to get as

much as possible for them: to give every objector a chance to object before the bonds were offered for sale, and if he failed to object (or objecting, if his objections were overruled), to make these bonds impregnable (all for the benefit of the district in enabling it to sell them for the highest possible price), a subsequent act, the act of 1889 (Stat. Cal. 1889 p. 212) was passed for the purpose of having all possible objections to the validity of these districts or their bonds settled once and for all. The act provided that the directors of the district might apply to the court for a decree of confirmation of the organization of the district and of its bonds. Anybody could file objections and the matter could then be litigated. The history of the litigation of this State shows that those having objections were not slow to file them. The Supreme Court of California, both before and after the decision of this Court in the Tregea case has consistently decided that such a proceeding was a proceeding *in rem*, and binding on all.

Section 3 of the "Wright Act" was also amended in 1891 (Stat. Cal. 1891, p. 144) to the effect that the validity of the organization of a district could only be attacked within two years. This limitation has been consistently upheld by the Courts in California.

With these laws in force, this district submitted to the people of the district the question whether bonds should be issued. It is worthy of note that only fifty votes were cast against the bonds out of a total of 398, substantially 400 votes. In other words, seven-eighths of the votes were for the bonds. Thereupon,

to avail itself of the confirmation law, to realize the highest possible price from the sale of the bonds if they were valid, and to know it, if they were not, the district made application to the Court to determine its own validity and the validity of its bonds which it proposed to sell. Notice was given of the application in the manner herein stated. No one at that time had any objections and none were filed. Full proof was made to the Court and the Court found and adjudged that the district was legally organized and that its bonds were valid. The bonds were then sold during the years 1891 and 1892 and 1893. The lands were taxed to meet the interest, *and the taxes were paid from the start* without dissent or murmur. No *certiorari* was brought to test the organization of the district. No complaint was made for a *quo warranto*. No injunction against the issuance of bonds. Nothing was done to give the slightest notice of trouble to intending purchasers. Nothing whatever was done to alarm them. On the contrary the payment of the taxes for the payment of the interest was a proclamation from the housetops, not only by the district, but by all the taxpayers thereof, that it was a *valid* district and that these were *valid* bonds. Upon no other theory could they have been paying these taxes. In consequence the purchasers not only relied upon the recitals contained in the bonds, not only relied greatly upon the decree of confirmation, but also *very* greatly upon the fact that here was a district whose existence and whose bonds were not only unquestioned by the taxpayers, but *which was fully acquiesced in by them*. Not only the purchasers of the last of these bonds but

all subsequent purchasers from the first purchasers (and such are the bonds in suit) were thereby led by these taxpayers to believe this district was *legally* organized and that these bonds were *valid; for the interest on these bonds were promptly paid up to July, 1896.*

With the money secured by the sale of these bonds, with *our* money, the district built large and extensive canals and ditches, procured water rights and, for eight years have been irrigating lands in this district and are so doing this very day. And yet they say that while the district has *done* and *is* doing this, the district *does not exist*, and that neither it nor its taxpayers *owe us a cent.*

The chief reason for their making this claim is that the 131 taxpayers who signed the petition (almost one-third of all the taxpayers in the district) did not sign the notice which they attached to their petition when they published it. Whose fault was it, if it was the fault of anyone, that they did not sign it? Their own. And they propose to visit the consequences of their own fault upon those who purchased their bonds and who, when the purchase was being made, were induced to believe that no error had been committed by the fact that they had never questioned the legality of the district but affirmed its validity by paying the taxes which it had levied!

The comments of this Court in the case of White vs. Luning, 93 U. S., 523, are quite applicable in principle to such a claim.

The immediate cause of the first failure to pay interest (on July 1st, 1896,) was because of the decision of the lower court in the case of Fallbrook Irrigation District vs. Bradley, declaring the Wright law unconstitutional. This Court reversed that decision, but hardly had that decision been announced (Nov. 1896,) until the decision of the Supreme Court of California was announced in the Central Irrigation District case (June. 1897,) holding that the notice published with the petition for organization of a district must be *signed*. It is true that decision was in a case where the attack upon the organization was *direct* and not collateral, a distinction recognized in the decision itself. It is true that that point received a vote of a bare majority only of the Court. The Court refused to say that the bonds of that district were *not* good (rather intimating to the contrary), but nevertheless some of the districts (including this one) are refusing to pay the interest on the bonds, holding that decision will sustain them.

The bonds in suit were purchased in the utmost good faith, and for full value, or, as the stipulation expressed it, " The said prices so paid to said Wesley A. Jacobs for the said bonds so purchased from him, and the said prices so paid to said R Linder for said bonds so purchased from him and the said prices so paid to said F. G. Shepard for the said bonds so purchased from him, were the full value of said bonds so purchased at the time they were so purchased, and each of said purchasers, so purchasing the same, did so purchase the same in good faith for full value, in the usual course of business without any actual notice or knowledge of any defect, informity or invalidity of said bonds

or any of them, and without any actual notice or knowledge of the non-performance or non-observance of any requirements of the law necessary to their validity, but so purchased the same under the full belief that all requirements of the law necessary to their validity had been performed and observed and complied with."

The interest not being paid on the bonds in suit, this action was brought upon the coupons in 1898.

Preparatory to bringing the action, and on January 18th, 1898, the plaintiff below procured a certified copy of the Judgment Roll of the decree of confirmation, which last named decree was dated Sept. 15th, 1890. The time for appeal from that decree had expired without appeal, one year after its date. So, at least, the decree then became and was final at all times thereafter. This certified copy of the judgment roll was introduced in evidence. After the date of the certificate to the certified copy of such judgment roll (which was January 18th, 1898,) to wit, on April 18th, 1898, three tax payers purported to file an answer in said proceedings, which answer does not seem to have been served on the attorneys of record of the district or in fact upon any one. Upon this purported answer a trial is recited to have been had and the organization of the district was thereupon declared to have been illegal and the bonds were thereby declared void—*all this after the decree of confirmation had become final and on which the holders of the bonds were securely resting, and without their being informed that the final decree was being attacked.*

No showing was made that this final decree of con-

firmation could thus be annulled or ignored, although the judge did say in his opinion that "subsequent" to that final decree a complaint was filed by Jauchius and others against the district to set aside the decree.

The exact date of filing that complaint to set aside this decree is not stated by the judge, but (by the permission of opposing counsel) I give the exact dates from a certified copy of those proceedings.

The complaint was filed in the Superior Court of Tulare County, California, on April 4th, 1898, entitled "B. W. Jauchius, J. L. Gould, George G. Kelly and Ralph Jones, Plaintiffs, vs. The Board of Directors of Tulare Irrigation District, Defendants," and was signed "C. L. Russell and G. W. Zartman, Attorneys for Plaintiff." Summons issued same day and served April 5th, 1898. General Demurrer of defendants signed "E. W. Holland, Attorney for Defendants," was filed April 15th, 1898. Judgment by default against defendants rendered and entered same day, April 15th, 1898, reciting that demurrer was submitted to the Court, on that day (same day it was filed) by both parties and overruled by the Court, "and said defendants having refused and declined in open court to answer plaintiffs complaint herein" the defendants were defaulted and judgment rendered against them according to the prayer of the complaint.

No bondholder was made a party in that action. It may well be imagined that in 1898, after the district had sold its bonds, built its irrigating works, had our money and no more bonds to sell, defaulting its inter-

est and claiming it did not owe a cent, it would make no very vigorous fight. It appears from the record here in that the attorneys signing the ~~answer~~ complaint as attorneys *against* the district in that action are the same attorneys signing the demurrer and answer as attorneys *for* the district in this action. I do not refer to the *counsel* who signed the answer in this action. They had nothing to do with that transaction. The history of what happened in the action to set aside the final decree, as given by the Judge in his opinion, is unique and, it is submitted, is unparalleled in the history of jurisprudence in civilized countries.

As will be seen by his opinion offered in evidence, in speaking of the proceedings in that case, he said:

"That matter was presented to the Court on demurrer to the complaint, which demurrer was submitted to the Court without argument, and at once overruled, in accordance with a well established rule of this Court, to overrule all demurrers that are submitted without argument. No answer was made to the complaint, and the petitioner took the relief asked for by default, and the Decree of Confirmation was set aside by the order of the Court."

Think of it! A tax payer sues a district to set aside a final decree on the faith of which bondholders have invested their money. Both parties to that suit are interested in avoiding the bonds. The party sued does not make any defense, of course; it makes default. The judge thereby gives judgment against the defaulting district as prayed for by the tax payer and enters judgment that the decree of confirmation be set aside and vacated. All this could be done (and probably

was done) in less than five minutes—in the time it takes to tell it. The opposing (?) attorneys walk into court; the attorney for defendant with a demurrer in his pocket and in a few minutes they all walk out again, the other attorney with a signed decree in *his* pocket! In this manner, by a simple twist of the, wrist, the district and its taxpayers, by this "arrangement" (to use no *stronger* word) between themselves *and themselves only*, have paid their debt of a half a million of dollars *which they owe to somebody else!*.

It was no *real* litigation. The evidence concerning this "second" decree was refused admission by the Circuit Court, as it ought to have been.

The district itself has paid no attention to this alleged "second" decree, *for it has continued to act and is now acting as such district*, as appears from the stipulation.

ARGUMENT.

I.

The plaintiff is a bona fide holder of the bonds sued upon, having purchased them in the usual course of business for full value and without any notice or suspicion of any invalidity concerning them.

This, as we have seen from the foregoing statement of the case, is fully stipulated, and this fact is a complete answer to almost every point made, and almost everything said by the learned counsel who wrote the brief upon the other side of this case. I shall have

occasion to refer to this fact at various times hereafter.

II.

The district is a de facto public corporation. This is as far as bona fide purchasers of its bonds need to go.

The only real point made by the learned counsel is that the notice of the hearing of the petition for the organization of the district was not signed, and hence that the district is not a *de jure* corporation. But we maintain that under the law it is entirely immaterial whether it was a *de jure* corporation or not. Before taking up the authorities upon this proposition, permit me to suggest to the Court that, if a purchaser of negotiable bonds cannot rely upon the legal existence of a municipal or public corporation when that corporation is exercising, unquestioned, all the powers it could exercise if it were legally organized, then there will be an absolute end to the sale of all municipal bonds of every nature and description. It is claimed by the counsel in this case that the findings of the Board of Supervisors of the fact that notice was given, cannot be relied upon by a purchaser, even if he had looked at those records.

The necessary logical result of such a doctrine would be that, before a purchaser of those bonds could safely purchase them, he would have to hunt up the newspaper in which the notice was published, and see for himself what was done in that regard. Counsel seems to ignore the statute itself which provided that the bonds should be "negotiable in form" and

should recite that they were issued "by authority" of that statute.

These requirements by the statute certainly meant something. They certainly did not mean that each purchaser must for himself look into the organization of the district, even to the examination of newspaper offices before he could safely buy a bond. A bond with such restrictions would not bring twenty-five per cent of its face value. In fact, it could not be sold at all, except as a gambling proposition, and, of course, at a gambling price.

The whole object of the law in trying to make those bonds bring as much as possible would be defeated.

That a *bona fide de facto* corporation, acting with all the powers of a regularly organized corporation, can incur debts and issue valid bonds is established by the overwhelming weight of authorities.

That doctrine has been conclusively settled very recently in the case of Shapleigh vs. City of San Angelo, 167 U. S., 646, which was a case where a municipal corporation had been dissolved by a decree in *quo warranto*. During its existence, however, the corporation had acted as a *de facto* corporation and had issued certain bonds. Referring to that time, this Court said:

"As things then stood, it is plain that the city could not have set up to defeat its obligations, any supposed irregularity *or illegality* in its organization. The State being the creator of municipal corporations, is the proper party to impeach the validity of their crea-

tion. If the State acquiesces in the *validity* of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: 'If a municipality had been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter.' Graham vs. City of Greenville, 67 Tex., 62, 2 S. W., 742."

It is true that later in the opinion the Court uses the language quoted by counsel on the other side, to-wit:

"The doctrine successfully invoked in the Court below by the defendant, that where a municipal incorporation is *wholly void ab initio, as being created without warrant of law*, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an *irregularly* organized corporation, which had obtained, by compliance with a general law *authorizing* the formation of municipal corporations, an organization valid as against everybody except the State acting by direct proceedings. *Such* an organization is merely voidable, and, if the State refrains from acting *until after debts are created*, the obligations are *not* destroyed by a dissolution of the corporation."

But it is perfectly evident from the previous language of the Court that when it used the word "irregularly" it did not intend to distinguish such a case as this from an irregularly formed corporation.

On the contrary the defect here, if defect it be, could as well be classed as being a mere irregularity, as the defect in that case was classed as being an irregu-

larity only. When this Court uses the language "the doctrine successfully invoked in the Court below by the defendant that where a municipal incorporation is wholly void *ab initio* as being created without warrant of *law*" it referred to the fact that there was *no valid law* under which such a corporation *could be formed*, such as the case of Norton vs. Shelby County, 118 U. S, 425, which was a case where the law under which the corporation claimed to be acting was *unconstitutional*. In fact, in such a case there is *no* law. In the Shelby case it was held that there cannot be a *de facto* corporation, in other words, a corporation claiming to be acting under some *law*, when there was in fact *no such law in existence*.

It will be noticed that the Shapleigh case was one where the question of the rights of innocent *bona fide* holders of bonds were concerned. The books are full of similar decisions. Many of them go to the extent of upholding this doctrine even where the rights of innocent third parties have not intervened.

In a prior case in this Court, the following expression was used in the opinion:

"The plaintiff had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto*, which is all that is necessary to enable it to maintain an action against anyone, other than the State, who has contracted with the corporation, or who has done it a wrong." Bank of Dandridge, 12 Wheat, 64, 72; Conard vs. Insurance Co., 1 Pet, 386, 450; Chubb vs. Upton, 95 U. S., 665; Insurance Co. vs. Frothing-

ham, 122 Mass., 391; Turnpike Co. vs. Cutler, 6 Vt., 315; Cincinnati, etc., R. Co. vs. Danville etc. R. Co., 75, 111, 113; Stockton, etc., R. Co. vs. Stockton, etc., R. Co., 45 Cal., 680."

Baltimore & P. R. Co. vs. Fifth Baptist Church, 137 U. S., 568.

It will be noticed that the doctrine was applied in the last case above cited, even in a case of tort.

"The objection that the corporation was not organized within the time limited by the charter is unavailing. It is in effect a plea of *nul tiel* corporation. In Kayser vs. Trustees of Bremen (16 Mo. 88), the Supreme Court of the State said: "It cannot be shown in defense to a suit of a corporation that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits until it be judiciously declared.' See also Smith et al. vs. County of Clarke, 54 Mo., 58 which is to the same effect. *This case being a Missouri case, these authorities are conclusive.*"

County of Macon vs. Shores, 97 U. S., 277.

See also County of Rolls vs. Douglas, 105 U. S., 730. Aller vs. Town of Cameron, 3 Dill., 198.

In a recent case in California, which, under the doctrine of the case of Macon v. Shores just quoted, *must be binding on the Supreme Court of the United States*, the very question came up with reference to one of these irrigation districts, where

a tax payer attempted to enjoin an assessment levied by an irrigation district, upon the ground "that the Board of Supervisors acted without their jurisdiction in effecting its organization," and the Supreme Court of this State said:

"An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare. (People v. Selma Irrigation, District, 98 California, 206, and cases there cited.)

Corporations organized under the act of the legislature popularly known as the Wright Act, being public corporations, it is immaterial whether they be corporations *de jure* or *de facto*. That is a matter which cannot be inquired into upon a collateral attack; and in a case like the present, where the validity of an assessment levied by such a corporation is the subject of litigation, the validity of such assessment does in no way rest upon the fact of the *de jure* character of the corporation. This principle must be considered settled law in this State (Dean v. Davis, 51 Cal., 411; Reclamation District v. Gray, 95 Cal., 601; Swamp Land District No. 160 v Silver, 98 Cal., 53.)

Quint v. Hoffman, 103 Cal. 507.

This case was approved upon this point as to an irrigation district in a very recent decision in California, wherein many other cases are cited to the same effect, where it is said:

"This court has repeatedly held that corporations of the character of defendant are *quasi* public corporations; and by the complaint in this action it appears that the defendant is, at least a *de facto quasi* public corporation. This court has also repeatedly held, that

upon collateral attack the validity and regularity of the organization of this class of corporations cannot be questioned. (People v. La Rue, 67 Cal., 530; First Baptist Church v. Branham, 90 Cal., 22; People v. Montecito Water Co., 97 Cal., 276; 33 Am. St. Rep. 172; Reclamation Dist. v. Gray, 95 Cal. 601; Swamp Land Dist. v. Silver, 98 Cal., 51; Quint v. Hoffman, 103 Cal., 506; Reclamation Dist. v. Turner 104 Cal., 334; Hamilton v. County of San Diego, 108 Cal. 284.)

If a proceeding in *quo warranto* by the State must be resorted to in order to test the *de jure* character of these corporations, the confirmatory act would serve no purpose on the statute books if the state be not bound by the judgment rendered in the proceeding.

Indeed, it would seem, *in the light of the above decisions of this Court*, that this statute was enacted for the very object of binding the *State*. We see no other *practical* purpose that could have actuated the mind of the legislature in creating it."

People v. Linda Vista Irr. Dist., 128 Cal., 484—5.

The very point sought to be reached in the above decision, was that the notice had not been signed, and it will be seen by the latter part of the above quotation that, in the opinion of the Supreme Court of California, in this very recent case, no private individual can raise that point in any proceeding, as against a *de facto* corporation. It was for that reason that the court says that the only object of the statute was to bind the State, inasmuch, as by the decisions which it quoted, a *de facto* corporation would be sufficient upon that point, as well as every other point, as against everybody but the State.

In one of the cases cited by the last case, the facts

were that a school district had been attempted to be formed within the territorial limits of the City of San Diego, which was contrary to the statute. Nevertheless, it had acted as a *bona fide de facto* corporation as a school district, issued bonds and levied taxes with which to pay them; a tax-payer, paying the tax, sued to recover it back on the ground that the organization of the district was a nullity, but the Court said:

"Since the Coronado school district had a *de facto* existence, the plaintiff could not have enjoined the collection of the taxes, nor have resisted an action for the same, on the ground of *illegality* of its organization. (Quint v. Hoffman, 103 Cal. 506; Dean v. Davis, 51 Cal. 406; Reclamation Dist. v. Turner, 104 Cal. 334; Swamp Land Dist. v. Silver 98 Cal., 51);—and, for reasons at least as strong, should not recover the money when paid."

Hamilton v. County of San Diego, 108 Cal. 284.

Many other California cases might be quoted to the same effect. The United States courts in California have equally upheld this doctrine in these irrigation districts, where the precise point was being made, that is being made in this case, namely, that the notice was not signed in the matter of their organization.

In a case in the Circuit Court, Northern District of California, the notice reads as follows:

"Notice is hereby given, that the above petition, will be presented to the Board of Supervisors at their regular meeting on Wednesday, May 11, 1887, at 11 o'clock A. M."

This was the Modesto District, the same that was before this Court in the Tregea case. After showing that this district was claiming to have been organized under a valid law, which had been held constitutional by the Supreme Court of the United States in the Fallbrook case, the learned judge demonstrated by ample authority and reason, that the defendant could not attack the validity of the district.

Herring v. Modesto Irrigation District, 95 Fed. 712.

That case, like this, was a suit by the bond holders upon their coupons.

In another case in the Circuit Court of the United States in California, in the southern district, the same precise point was involved, and for the very reason that is given in this case, namely, that no notice was ever given of the presentation of the petition to the Board of Supervisors, the same not having been signed, and the learned court held that a de facto corporation could not be questioned by an individual.

Miller v. Perris Irrigation District, 85 Fed. 698, et seq.

So many cases have been cited to the same effect in the cases already adverted to that it would seem unnecessary to burden the Court with still further citations; but should the Court desire to consult still further authorities a few more are added here.

Graham vs. City of Greenville, 67 Tex. 62, and cases cited.

Dallas vs. Huydekiper, 154 U. S., 654.
Board vs. Thomas, 61 Fed., 914.
Coler vs. Dwight Township, 55 N. W., 587.
Dean vs. Davis, 51 Cal., 406.
Reclamation District vs. Gray, 95 Cal., 601.
Swamp Land District vs. Silver, 98 Cal., 51.
Reclamation Dist. vs. Turner, 104 Cal., 334.
F. L. and Trust Co. vs. Toledo, etc. Ry Co. 67 Fed., 55, and cases cited.
Fitzpatrick vs. Rutter, 160 Ill., 282.
State vs. Leatherman, 38 Ark., 81.

The last is a very leading case. There a corporation had acted *de facto* and had issued bonds. The Court said there was no jurisdiction and the order creating the corporation was void, but it had been an existing *de facto* corporation all the time from 1873 until the decision. That was a *quo warranto* proceeding and it was held that even the State could no longer attack the corporation.

To the same effect on a *quo warranto* proceeding was State vs. Town of Westport, 116 Mo., 582.

In the case of In re Short, 47 Kas., 250, an immense number of cases are collected.

The last case was where a man was convicted under an ordinance of a town, the validity of the organization of which he disputed.

See also State vs. Fuller, 96 Mo. 165.

The above was a case where a man was indicted for

assaulting the city marshall of Ash Grove, a city of the fourth class which was formed under the general law. The defense of the defendant was that there was no such town, and hence no such officer, but it was held that it was a *de facto* city, and he could not raise the question as to its existence.

Very, very many authorities might be added, but I quote from a few only, in closing upon this point.

"A person who contracts with a corporation whether it be by a subscription of its stock or by promissory note, bond, mortgage or other form of contract is, in a suit upon such contract, estopped to deny the existence of the corporation; *and similarly when a body of persons hold themselves out as a corporation and contract as such they will be estopped to deny their corporate character.*"

7 Am. & Eng. Ency. of Law (2d Ed.), 668.

"An association which is assuming to be and has acted as a corporation and incurred obligations in that capacity; is estopped to deny its own corporation existence in order to relieve itself *or its members* from such liability."

8 Am. & Eng. Ency. of Law (2 Ed.), 769.

"The corporate existence of a municipal corporation cannot be attacked collaterally in a suit to enforce its bonds. A *de facto* corporation exercising the powers granted to a body legally organized is estopped to plead its illegality.

When a municipal body has assumed under color of authority and exercises for a considerable period of time with the consent of the State the powers of a public corporation of a kind recognized by organic law, neither the corporation nor any private party can,

in a private litigation, question the legality of its existence."

Simonton on Municipal Bonds, page 5.

Cooley on Constitutional Limitations (6th Ed.), 309-10.

"In proceedings to enforce ordinances, the *illegality* of a *corporate organization* cannot be shown to defeat a recovery; in such a collateral proceeding, evidence that the corporation is acting as such is all that is required."

1 Dillon Municipal Corporations (4th Ed.) 418.

(The italics are the author's.)

As has already been observed, were this *not* the rule, *municipal bonds would be a thing of the past.* Nobody would dare to buy them or, if they were bought at all, they would be bought, as already remarked, as a gamble, at gambling prices.

If we are right on the foregoing propositions, then that will, of course, end this case, and no further investigation need be made. As a matter of duty to my client, however, I feel it incumbent upon me to argue the other questions that have been raised.

III.

The defendant and its taxpayers are estopped from denying that the defendant is a valid corporation.

The defendant and its taxpayers have ratified the organization of the district.

As the authorities, which will be cited frequently, consider both the above propositions, I will consider

them together. We have already seen from the statement of the case that out of 484 votes cast on the proposition of establishing the district, only seven votes were against it, and when they came to voting for the bonds, only 50 voted against that proposition, out of 398 votes cast upon that proposition. Seven-eighths of the votes were in favor of the bonds, and nearly 69-70ths of the votes were in favor of the organization of the district.

It must have been evident to every taxpayer in the district that, if nothing was done to arrest subsequent proceedings, these bonds would be sold to innocent purchasers, and, if the present contention is true, that they, by standing by, would see an innocent purchaser investing his money, on the strength of the belief that the taxpayers' lands and other lands of the district were bound for its repayment.

A writ of *certiorari* would easily have reached every defect in the organization of the district. A complaint to the attorney general for a *quo warranto*, promptly made, would immediately be granted and the district declared null and void. An injunction against the officers from proceeding further, would readily have been granted; all this, of course, on the theory that they are right in their present contention. Instead of taking any of these proceedings, the taxpayers rested supine. They allowed the proceedings to go on and the bonds to be issued. They allowed a decree of confirmation to be taken without a protest. They allowed the two years provided by the statute to attack the organiza-

tion of the district to expire without any action what ever.

Not only that, but, knowing that these bonds would be sold, they permitted them to be sold, and have used the money to build their irrigation works, and are using those works this very day for the irrigation of their lands.

They have never offered to return a dollar of that money. They are using the water works which that money paid for.

Not only did they know that, if nothing was done, innocent purchasers would invest their money in these bonds, but they *assisted* to bring about that result by *promptly paying the taxes*, for the interest on the bonds as fast as they were issued. What purchaser would have the slightest suspicion of their being any invalidity about a district, or about its bonds, when the taxpayers were paying the taxes regularly, and so continued for eleven straight installments without a whisper of discontent?

If this were a private transaction, there is no question but what the district and these taxpayers would be stopped from denying the liability. A few cases will be given to illustrate this proposition.

In a case where an assumed agent sold a principal's property and paid the principal the money, the principal, or rather the heirs of the principal, were not permitted to question the authority, since they received the money and held on to it.

"The purchase money for the land was received by the principal and to permit her heirs after her death to repudiate the transaction on the ground that the power of attorney had been revoked, would be at variance with every principle of equity and fair dealing."

Williams v. Payne, 169 U. S., 55.

Speaking of a case where the *de jure* existence of a corporation was disputed, and where the corporation issuing the bonds, still held on to the proceeds arising from their sale, this Court said:

"*Common honesty* demands that a debt thus incurred *should be paid.*"

Commissioner v. Bolles, 94 U. S., 110.

Speaking of the doctrine of estoppel under such circumstances, this Court has said:

"The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could have saved them from defeat. It proceeds upon the ground that he who had been *silent* as to his alleged rights when he ought, in good faith, to have *spoken*, shall not be heard to *speak* when he ought to be *silent*. The Bank of the United States v. Lee, 13 Peters, 107.

He is not permitted to deny a state of things which, by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief.

Morgan v. Railroad Co., 96 U. S., 720.

"Where a person *tacitly encourages* an act to be done he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encour-

agement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary rights."

Swain v. Seamens, 9 Wall., 254, 274.

"Where a person by word or *conduct* induces another to act on a belief in the existence of a certain state of facts, he will be estopped as against him, to allege a different state of facts."

Dolbear v. Livingston, 100 Cal., 621–2.

"There is no principle of law better settled, or resting on wiser considerations of public policy and higher considerations of justice, than that no person who has received and *retains* the fruits of a judicial proceeding can be heard to assail it, either for irregularity or *illegality*, to the prejudice of others who have in good faith relied and acted upon it as valid. In the application of this principle it is not of importance that the proceeding is void *because of want of jurisdiction in the court entertaining and sanctioning it.* The foundation of the principle is that parties cannot act upon and adopt such parts of a transaction as may be favorable and beneficial to themselves, and, at the same time, repudiate it so far as it may involve them in corresponding duties to others who have yielded the right and advantage to them."

Ions v. Harbison, 112 Cal., 271.

The Supreme Court of California quotes from the case of Dickerson vs. Colgrove, 100 U. S., 580, as follows:

"The vital principle is that he who by his language *or conduct* leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon

which he acted. *Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.*"

Carpey vs. Dowdell, 115 Cal., 687.

"The term 'acquiesce' as used here by the Court means a consent inferred from silence; a tacit encouragement. 'Where a person tacitly encourages an act to be done, he connot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by assertion of such adversary claim.' (Swain vs. Seamens, 9 Wall. 254.) Acquiescence is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right.' (Rapalje and Lawrence's Law Dictionary.) By accepting and *retaining* possession of the patents, the defendant virtually deprived Watkins of the use thereof, and indicated that he was satisfied with what Watkins had done under the contract.' Although Watkins continued in his employ for a long time after the contract was made, nothing was said about an assignment, both parties having apparently considered that none was necessary; and it would be a hardship now upon Watkins and his assignee if they should be deprived of the value of the property *through what was evidently a mutual mistake in regard to that matter.*"

Scott vs. Jackson, 89 Cal., 263.

"When they neglect to promptly and actively condemn the unauthorized act, *and to seek judicial redress* after knowledge of the committal of it, *this will be deemed an acquiescense in it*, and if innocent third

persons have been led thereby to put themselves in a position from which they cannot be taken without loss, if the act were held invalid, the stockholders will be *estopped* from questioning it."

Sheldon H. B. Co. vs. Eikemeyer H. B. M. Co., 90 N. Y., 613-4.

"The second cause upon which appellant bases his right to an injunction would be a sufficient one if urged by a person who had not *estopped* himself by his *silence.* * * * The appellant made no objection *until after the work had been fully completed;* he is not now in a situation to complain of the insufficiency of the notice of the letting of the contract. *Having received the full benefit of the work done by the contractor, he cannot now escape payment upon the ground that proper notice of the letting of the contract was not given.*"

Muncey v. Joest, Treasurer, et al., 74 Ind., 413.

The above was a case where no bonds were involved and where a drainage district had cut a ditch through the lands of appellant, and when he was called upon to pay his share under an assessment, he made the objection of want of proper notice.

The Court held there was not a proper notice of the letting of the contract for the ditch, but held as above stated.

Of course authorities might be multiplied along this line indefinitely.

Now the question arises, do corporations and their shareholders or taxpayers (according as to whether it is a private corporation or a public one), stand upon any different footing as to *honesty* in matters of this

kind? Must not a corporation, public or private, be just as honest as a private individual and be held to just as strict a liability, where a question of right is concerned?

"A corporation quite as much as an individual, is held to a careful adherence to ***truth*** in their dealings with mankind."

Hackett v. Ottawa, 99 U. S., 96.

"Corporations are as strongly bound to an adherence to ***truth*** in their dealings with mankind as are individuals, and they cannot by their representations or ***silence*** allow others to part with their money or property and then repudiate the obligation for which the money was expended and which their statement represented to be valid."

Natl. Ins. Co. vs. Board of Education, 62 Fed. 784-5.

"It is well, occasionally, to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other."

Meyer vs. Brown, 65 Cal., 589.

In the application of this rule, to corporations public or private, a few of many cases will be cited.

"While Courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requirements of a statute, in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so tech-

nically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company *were carried on in evident good faith. No one questioned their validity; no effort was made to review the action of the county judge; the bonds were issued; more than $100,000 was spent within the limits of the town in the construction of the road; and years went by, during which the town paid the interest and part of the principal before any question was made as to their validity.* We think there is eminent wisdom and justice in the observations of the Court of appeals in the case of Calhoun vs. Millard, supra:

"*The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition, encouraged investment therein, as safe and valid securities. The bonds, resting on the adjudication of the county judge, were apparently valid.* * * * The denial of relief in this case may result practically in the enforcements of the bonds in question, and also of other town bonds issued and held under similar circumstances. *But in contrasting the relative conduct and situation of the town and the taxpayers, on the one side, and the purchasers of bonds, on the other, we cannot say that such a result will be repugnant to any principle of justice or equity.*"

Town of Andes v. Ely, 158 U. S., 312.

"The community at large must form their judgment of it from the acts and resolutions adopted by the authorities of the corporation and the *meeting of the stockholders, and by their acquiesence in them.*

These negotiable securities have been placed on sale in the community accompanied by these resolutions and votes, *inviting public confidence.* They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. *Men have invested their money on the assurance they have afforded.*

A corporation, quite as much as an individual, is held to a careful adherence to *truth* in their dealings with mankind, and cannot, by their representations *or silence,* involve others in onerous engagements, and then defeat the circulations and claims *their own conduct had superinduced.*"

Zabriskie vs. The C. C. and C. R. Co., 23 How., 400-1.

The power is expressly given in our statute to a board of supervisors to establish the boundaries of an irrigation district, and submit the same to the voters as to whether they shall have a district. It is true the general power thus given is only to be exercised by the board on receiving a petition and notice, but the general power given to a municipality to issue bonds may be equally dependent upon an election of the people for the bonds, held upon proper notice. In such a case where it was claimed no notice of the election was given, this Court said:

"It is further to be said, that if there was, in fact, *any want of proper notice of the election,* the omission was only an irregularity in the exercise of an express power to issue the bonds, an irregularity in respect to a step forming part of preliminary conditions, and that the failure of the *municipality* and of the *taxpayers* to

enjoin the issue or use of the bonds, during the long period from the day of the election, September 13, 1869, until the bonds were registered in March, 1872, when they still belonged to and were in the hands of the company, *coupled with the annual payment by the county for ten years, of the interest on the bonds*, are sufficient grounds for holding that the municipality is *estopped* from defending on the ground of such non-compliance with a condition precedent as is set up in this case, *after* the bonds have been negotiated for value by the company. The record of the proceedings of the board shows that a tax was levied to pay the interest which fell due January 1, 1871, while the company still held the bonds."

Anderson County Commissioners vs. Beal, 113 U. S., 240.

"Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted *to enjoin* the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, *without interference or complaint.*

When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, *it was then too late* to call in question the fact determined by the common council, *and a fortiori is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.*"

Bissell vs. City of Jeffersonville, 24 Howard, 299.

The last case was where it was claimed that the bonds

were absolutely void for lack of jurisdiction, because three-fourths of the legal voters did not petition therefor.

"It should be observed that this contention was not made by appellant *prior* to the sale and delivery of the bonds to the Oakland Bank of Savings; but these questions are now presented as between the taxpayers of the City of Modesto and the holder of the bonds *after* their purchase, *and after the city has received the full purchase price.*"

Derby vs. City of Modesto, 104 Cal., 517.

"We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, *and to seek judicial redress* from knowledge of the committal of it, where innocent third parties have been led to put themselves in a position from which they cannot be taken without loss."

Foster vs. Bearvalley Irrigation Co., 65 Fed., 846-7.

"To this condition of affairs, this company having a corporate name which the legislature had given it, *claiming* to be a legal corporation, and having, even if the articles of consolidation had been illegal, at least a *colorable* right to make such claim, controlling and building a railway *as an organized corporation*, and asserting the right to condemn land for its corporate purposes, *issues its bonds to the amount of seven hundred thousand dollars, and sends them on the markets of the world.* To secure their payment it issues a mortgage upon the road it claims to own, and is engaged in building, and in both bonds and mortgage *describes itself as a corporation* existing under the law

of Wisconsin and Illinois. The bonds go into circulation, and the money which had been received for them passes into the treasury of the company, *and is expended upon the construction of the road.* In process of time, the coupons upon the bonds are left unpaid, and the holders come and demand their money. To this demand the company replies that although it issued the bonds and mortgage as a corporation, and thus procured the money, *yet it was not a legally constituted corporation*, and therefore will *not* pay the money but *will* retain the road.

The doctrine of equitable estoppel has so often been expounded by the Courts that it needs neither definition nor the citation of authority. In our judgment, a clearer case than this for its application has rarely arisen. We are not saying that a corporation is estopped by its bonds and mortgage from raising the question as to whether, in making them, it was acting within its chartered powers. The question whether the mortgage now under consideration was within the power of the company to make, we shall presently consider. But we do say that where a company has issued its bonds and mortgage *under the circumstances above detailed*, the courts of every *civilized* country must hold it *estopped from denying its own corporate existence*, for such a defense is repugnant to every sentiment of justice and good faith. That this doctrine of equitable estoppel, or estoppel *in pais*, by which a person has represented to another the existence of a certain state of facts, and thereby induced him to act on the faith of their existence, is concluded from averring against such person and to his injury that such representations were false, is *as applicable to corporations as to natural persons*, will hardly be denied: Hall vs. Mutual Fire Ins. Co., 32 N. G., 297; and Zabriskie vs. Columbus, etc., R. R. Co., 23 How., 391."

Racine, etc., R. R. Co. vs. Loan, etc., Co., 49 Ill., 331.

We call the Court's particular attention to the above case because it is so applicable to the case at bar.

The two cases are on all fours with each other.

See also a very strong case by this Court recently decided:

Penn. Mut. Life Ins. Co. vs. City of Austin, 168 U. S., 685.

Assuming that the notice of the formation of the district was defective, yet it is apparent that nobody thought it was anything but in perfect legal form. Where parties practically construe a contract, it estops them from afterward changing that construction. Something of that same principle ought to be applicable here, for the parties have practically construed this notice as being legal and sufficient, and on that construction innocent parties have acted.

If they intended to dispute its validity, they should have done so then and there. Certainly they should have done so before third parties invested their money upon the strength of it.

If any taxpayer thought that the notice was illegal, still he might very well elect to be bound by the organization of the district. It was necessary for him then and there to elect either to be bound by the organization of the district, or to attack it, and he could not, for the purpose of the gain that it might be to

him, allow innocent purchasers to buy the bonds, with the proceeds of which he could build his water works, when he at all times had the secret intention in his heart that when he should receive these benefits, he would then attack the organization of the district, hold on to the benefits, and prevent the party he had thus misled from receiving back his money.

I use the word "misled" advisedly, in the light of the foregoing authorities, for he had not only kept silent when he knew this half million dollars would thereby flow into his lap from the innocent purchasers, but he had actively aided and assisted to bring about the fact that these innocent purchasers should buy the bonds, and part with their money, by paying the interest on the bonds as they were issued. For he must have known that for him to pay taxes to the district was for him to proclaim to the world that such district actually existed. Otherwise, why should he pay taxes to something that did not exist, and under tax levies made by something which was nothing? Is there any *statement* he could have made to the intended purchaser as to the validity of the district, anything he could have *said* in that regard that would have had half the convincing force that the payment of taxes by him would have? It is an old saying that "money talks louder than words," and however homely the saying may be, no one can gainsay its truth; and it is doubly true in a case like this.

IV.

The determination of the Board of Supervisors that

notice had been given is conclusive in favor of bona fide holders of bonds.

It is evident from the provisions of the statute that *some* one was to ascertain and determine that fact: otherwise why should the statute say the bonds should be "negotiable in form" or why should it say that the bonds should recite that they were issued "by authority" of that act? The idea of the statute clearly was that the holders of these bonds should not have their validity assailed. The intent was that the bonds should bring the highest possible price, and that to accomplish that result it was necessary for the purchaser of the bonds to believe them to be impregnable.

Assuming that the statute did not in so many words provide that the supervisors should determine that particular fact, yet if from the necessity of the case, it was necessary for them to do so, that is sufficient. *And, in favor of bona fide holders of bonds, their decision is conclusive.*

Town of Colma vs. Eaves, 92 U. S., 484.
Commissioners vs. Bolles, 94 U. S., 107.
Commissioners vs. January, 94 U. S., 202.
Oregon vs. Jennings, 119 U. S., 74, 92.
Bernard Township vs. Morrison, 133 U. S., 524, 528.
Miller vs Perris Irr. Dist, 99 Fed., 147-8.

But the Board of Supervisors were, even in *words*, directed to determine the fact whether notice was

given. The law provides that the petition signed by fifty or more taxpayers "shall be published * * * *together with a notice stating the time of the meeting at which the same will be presented.* When *such* petition" (that is a petition published *with such notice*) "is presented, the supervisors shall hear the same." The Board was therefore called upon to determine whether *such* a petition had been presented before they proceeded to hear the same.

Now they did determine that fact, and their determination thereof was entered on their records. Their records show as follows: "And the Board having fully heard the testimony and proofs * * * finds the *facts* to be as follows, to-wit: Said petition, together with a notice stating that said petition would be presented on Monday, the 1st day of July, 1889, was duly published," etc.

It will be observed that the Board used the same phraseology the statute did; the statute said the petition "together with a notice" etc., *shall* be published, and the Board found that the petition "together with a notice" etc., *was* published.

An innocent purchaser of the bonds was entirely justified in believing the word "notice" was used in the same sense and with the same breadth in meaning, in the finding as it was in the statute.

There is some criticism as to whether the finding should not have been more specific. Certainly the finding need not amplify the word used in the statute.

Besides, the finding is no more general than are

those which usually appear in the statement by boards, commissioners, or officers, as to the performance of the necessary prerequisites, *and which general statement fully protects bona fide purchasers of bonds.* A finding in most general terms that an election was had, is sufficient. Even where the bonds merely recited that they are issued "under the authority" or "by authority" or "in pursuance of" a statute, or general words of similar import, it is held to be a sufficient statement as to each prerequisite fact. No more detailed statement or finding as to any fact is required by the special board, commissioner, tribunal or officer, *in order to protect a bona fide purchaser of the bonds.* It is needless to cite authorities to this proposition, since this is the general recital or statement in the bonds in *all* the cases, where that subject is considered.

If this was not a case where the rights of innocent purchasers of bonds were concerned, it might then become a proper subject of inquiry as to whether a different rule should obtain.

V.

The recital in the bonds is conclusive of their validity in favor of bona fide holders thereof.

The bonds in suit recited that they were issued "by authority and in pursuance to" the statute.

The statute provided, as we have seen, that the bonds should be "negotiable in form" and should re-

cite that they were issued "by authority" of that act. How could they be issued by "*authority*" of that act unless there was a district acting under that law? That act was "authority" for the issuance of no bonds, except bonds issued *by irrigation districts.*

The recital covered the fact of the *legal existence* of a district as much as it did the *acts* of the district.

"In a proceeding brought for the purpose of determining the validity of an issue of bonds, one of the most vital questions arises upon the validity of the organization of the district contemplating the issuance of the bonds. *A valid organization of the district is a condition precedent to a valid issue*, and of necessity the validity of the organization must be considered and passed upon in a proceeding brought directly to test the validity of the bonds.

People vs. Linda Vista Irr. Dist., 128 Cal., 485.

Therefore when the bonds of a *bona fide* acting district, which district claims in good faith to be acting under the law, and its acting as such corporation is disputed by no one, but is acquiesced in by all, even its own taxpayers, who pay taxes to it under its levies, when the bonds of *such* a district recite they were issued by *authority* of that act, they necessarily recite that the district was legally organized under that act, since "a valid organization of the district is a condition precedent to a valid issue" of the bonds.

Now the rule is that where there is a valid law under which bonds *could* be legally issued, and the bonds recite that they were issued by "authority" of that law, the recital is conclusive in favor of *bona fide* holders

of such bonds, as to their validity and as to the due performance of every act to make them valid.

Commissioners vs. Bolles, 94 U. S., 108-9.
San Antonio vs. Mehaffy, 96 U. S., 314.
County of Macon vs. Shores, 97 U. S., 278-9.
See the cases partially collected in P. L. and T. Co. vs. Mercer County, 170 U. S., 593.

A few cases may be cited out of the scores of others to the same point that might be cited in addition to the above, to iliustrate the question, where want of notice, or deficiency of notice, was claimed. It is true the notice in such cases referred to an election, but, as has been observed under another point, the general powers given to a municipality to issue bonds upon an election of the people held upon notice, can no more be exercised without that election upon such notice, than can be the general power given to boards of supervisors to establish irrigation districts upon petition and notice thereof; and the recital will necessarily cover the one as well as the other, the one being no more jurisdictional than the other.

A statute provided that the officers of a town could issue bonds *if* authorized by a vote of the electors at an election to be held *upon notice to them of such election.* In fact the notice was not given, but the officers decided and certified that it *had* been, and thereupon issued and sold the bonds to innocent purchasers. In an action *by the bona fide purchasers* the Court held that the certificate of the officers that such notice *had* been given was conclusive evidence *in favor of bona fide holders of bonds.*

Town of Colma vs. Eaves, 92 U. S., 484.

In Indiana the statute provided that commissioners of a County could issue bonds *if* authorized so to do by a majority of the electors at an election to be held pursuant to a notice given *by the sheriff*. The sheriff never gave such a notice, but the commissioners recited that the bonds were issued "pursuant to the statute," which the Court held was an adjudication that a notice had been given *by the sheriff*, and refused to allow it to be proved that in fact there was no notice.

Knox County v. Aspinwall, 21 How., 539.

This authority is a leading one on this point, and stands as the law to-day.

See cases approving it collected in note in 98 Am. Dec, 687— 9.

In a case where the statute provided that an election might be held on a notice thereof given to the tax payers for thirty days, an election was held without a notice being given for that time. The officers, however, issued the bonds to a bona fide purchaser, reciting that they were issued in " pursuance of, and in accordance with the act of the legislature."

The Court held this recital to be a conclusive adjudication that there *had* been a notice of thirty days, and refused to let it be shown that such notice had not been given.

Humboldt Township v. Long, 92 U. S., 645.

In an action *in rem* against real estate, the sheriff recited that he had served the process as required by

law. Judgment and a sale followed to an innocent purchaser. As a matter of fact the summons had *not* been served, but the Court refused to let the owner show that fact as against the innocent purchaser who had bought on the faith of the sheriff's certificate of service and the Court's judgment thereon.

Reeve v. Kennedy, 43 Cal., 643.

See also McCauley v. Fulton, ~~42~~ 44 Cal., 361 and cases cited.

Riley v. Lancaster, 39 Cal., 354.
Eitel v. Foote, 39 Cal., 440.
Gregnon's Lessees v. Astor, 2 How., 319.
Walker v. Cronkite, 40 Fed., 133.
Sargent v. State Bank, 12 How., 371.
Tilton v. Cofield, 93 U. S., 163.
Simmons v. Saul, 138 U. S., 439 and cases collected.

When the statute required the bonds to recite that they were issued by *authority* of the statute, did it intend that the parties issuing the bonds should recite the truth or a lie? If it intended them to recite the truth, did it not necessarily give those persons the *power*, nay, more, did it not make it their *duty* to first ascertain and determine whether the bonds were or were not issued by the *authority* of the law? In other words, did the law not require them to ascertain and determine whether the law *authorized* them to be issued? And in determining whether the law *authorized* their issuance, were they not met at the very threshold

with the question of whether all the necessary acts had been done to form a district under that law, since without a valid district, the law did not *authorize* the issuance of the bonds? Have we not, then, not only the finding and decision of the Board of Supervisors, but also the finding and decision of the parties issuing the bonds that all the acts necessary to be done in order to create a valid district *were* done? And we have seen that either of such decisions is conclusive in favor of a bona fide purchaser of such bonds.

VI.

While it is not necessary to this case, the Court's attention is nevertheless called to the fact that the notice of the hearing of the petition was sufficient.

When these bonds were purchased by plaintiff and his assignors they (and the bonds of other districts having similar notice) were regarded and treated as being valid securities by the districts themselves, by the taxpayers of those districts, by the public, by the legal profession, and by the Courts. No objection was made to them by the Courts on account of the notice not being signed, although the fact that the notice was not signed, appeared in the transcript, as will be seen by examining the same, in several of the cases where the validity of the district and of the bonds was in question, even in the earlier cases.

Central Irr. Dist. vs. De Lappe, 79 Cal., 351 (decided in 1889).

Modesto Irr. Dist. vs. Tregea, 88 Cal., 334 (March 1891.)

While the point was not raised in these earlier cases, yet the point was then plainly apparent to both Court and counsel, and was raised by the record. While it might not be *res adjudicata* on that point, as the Court in the second appeal of the Central Irr. Dist. (117 Cal., 382.) held it was not, still as a justification for these purchasers to buy, regardless of this point, it might well be held to justly fall within the doctrine of the case of Gelpcke vs. City of Dubuque, 1 Wall., 175, which decision is to the effect that a purchaser of negotiable bonds can rely on the law as it was treated by the State Court previous to his purchase. Certainly, and in any event, when this Court shall come to determine what was absolutely required to be a valid notice, it can very well say that these notices were valid and that the purchaser was justified in believing them to be valid, when the districts, taxpayers, public, Courts, and counsel all *assumed* them to be perfectly legal. In such a case this Court said:

"In the case at bar the statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township and were purchased by the plaintiff, in 1886. It is alleged in the complaint and admitted by the demurrer that he purchased the bonds, relying upon their being legal and valid obligations of the township, and that at the times of their issue and purchase these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the legal profession, and by the legislative, executive, and judicial departments of the State. And the decisions of the Supreme Court of the State during the same period appear to have

assumed the validity of such bonds. Chamblee vs. Tribble and Railway Co. vs. Tribble, above cited."

Folsom vs. Township Ninety-six, ~~154~~ 159 U. S., 611.

This Court, under those circumstances, held the statute should be construed in favor of the bonds, notwithstanding the State had theretofore, but subsequent to the issue of the bonds, construed the law so as to invalidate them.

If a taxpayer saw this petition being published, and saw it published "together with" a notice of the time of the meeting, would not this give him full and fair notice of the time of the meeting unless he was an idiot?

The statute fully protected the parties interested by providing that the petition and notice should be published "*together*;" that the petitition should be pub lished "*with*" the notice. Such was the construction placed by the author of the law upon its requirements, as shown by the record in the case of Board of Directors of the Modesto Irrigation District v. Tregea 88 Cal, 334, (same record in Tregea v. Board of Directors, on writ of error to this Court, 164 U. S. 179,) for that was the very first district organized in the State, and he organized it so far as preparing the legal papers was concerned. He informs me that there was only *one* district organized in this State under a *signed* notice (the Madera District), and that district never issued any bonds, having disincorporated before doing so.

This construction, as to what a valid notice should be, as we have seen, was not only adopted by every existing district in the State in the *organization*, but that construction was also given the law by everybody, even the taxpayers, who never had even a doubt as to their having had *legal* notice. It would seem that a notice *which had served its purpose so well*, that gave so much notice that even the adverse parties thought it was a good notice, could well be considered such a notice, as gave them their day in Court, and was a good enough notice to prevent it being said that those parties have been deprived of their property without due process of law for want of a notice. If it was a good enough notice to have *actually accomplished* the whole object of the statute in requiring a notice at all, it certainly is good enough to be held to be a *valid* notice.

It is to be observed that the Supreme Court of California, in the Central Irrigation District case (117 Cal.. 382) did not say that it was not a good enough notice *as to such bonds in the hands of innocent purchasers*. It expressly reserved that question. In fact, its intimation was that such bonds would be *good*. The Court in that connection said:

"The bonds are negotiable: public corporations are estopped from setting up many defences of *irregularity*" (evidently considering the defect as an *irregularity merely*) "against the innocent holders of such negotiable securities."

In re Central Irr. Dist. 117 Cal., 400.

It is further to be observed, that while in that case, it was held by the Court (by a bare majority) that the notice ought to be signed, yet the notice there under consideration was in some respect different from the notice here.

There the notice read as follows:

The foregoing petition will be presented to the Honorable Board of Supervisors of Colusa County, on Monday Oct. 10, 1887, at 10 o'clock A. M., of that day."

The notice in this case reads somewhat differently, the material difference being indicated by the portions italicized below:

"*Pursuant to the statute in such case made and provided*, notice is hereby given, that the above and foregoing petition, will be presented to the Board of Supervisors, in and for the County of Tulare, at their first monthly meeting in July 1889, to wit, on Monday, the 1st day of July, 1889, *at which time any person or persons, desiring so to do, may present their objections, if any they have, why said petition should not be granted.*"

It was stipulated that this notice and the petition were published "*together*," that the notice was published "*with*" the petition, that both were published in the same type and that they were published "together" by being segregated from the rest of the printed matter in the newspaper, by black lines across the column, the first black line across the column *at the beginning of the petition* and the other black line across the column *at the end of the notice.*

Attention is called to the differences in the two notices because it entirely dispels at least one of the Court's arguments that the notice read like a "bit of news," and might have been inserted by the "editor" as such.

Central Irr. Dist. 117 Cal., 392.

A "bit of news" does not commence with such words as "pursuant to the statute in such case made and provided," nor does it end with such words "at which time any person or persons desiring so to do may present their objections, if any they have, why said petition should not be granted." Nor is a "bit of news" so arranged by segregating black lines across the column as to make it appear to be virtually a part of another document, to which it appropriately refers.

Another thing to be considered in this connection is that this is not a case where there is an absence of *all* notice, but a case where at most all that can be said against it is that there is a mere irregularity in a notice actually given, which has misled no one and which has operated *in the actual accomplishment in giving notice* as fully and as effectually as a notice without such irregularity could possibly have done. This will be more fully stated in the next point.

In such a case how can it be said that any person has been deprived of his property without due process of law?

The statute should receive a liberal construction *in favor of innocent purchasers of negotiable paper.* In

such a case the Supreme Court of California laid down this rule for its guidance quoting the same from Dillon on Municipal Corporations, when that learned author was speaking of the Supreme Court of the United States:

"It has rejected, when necessary to protect the *bona fide* holders of such securities, narrow and rigid constructions of statutes authorizing the creation of such debts.'"

Derby vs. City of Modesto, 104 Cal., 518.

And the Supreme Court of California announced in that case that it adopted that rule for its guidance *when the rights of bona fide purchasers were in question*, and hence a notice like this, which has actually given *and is fitted* to actually give notice, should be held sufficient.

It is also to be noted that not only has the Supreme Court of California in all its earlier cases treated these notices as good notices, but they were treated as good notices by *this* Court in two recent cases.

In the case of Tregea vs. Modesto Irrigation District, 164 U. S., 179, the notice was set out in the record, and was before this Court. It reads:

"Notice is hereby given that the above petition will be presented to the Board of Supervisors at their regular meeting on Wednesday, May 11, 1897, at 11 o'clock A. M."

If this was not sufficient notice in the opinion of the Court it would doubtless have disposed of the

case on that ground, for that case was on a direct attack; certainly Justices Harlan, Gray and Brown thought the notice good for they were in favor of affirming the judgment of the Court below on the merits. Cotemporaneously with the decision in that case a decision was rendered by the same Court in the case of Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, wherein the question of notice was a predominating question. The judgment was reversed in the latter case, upon the ground that the notice *had* been given. The notice in the Fallbrook case was not signed either. This Court must have held that notice to be good. I assume it was before the Court, of course, or it could not have held the notice to be good and reversed the case. The record, however, is not accessible at this moment.

In that case, the notice preceded the petition, but the notice and petition were published "together" and the petition was published "with" the notice. The notice, as I am informed, from records in this State, reads as follows:

"Notice. Public notice is hereby given that at a regular meeting of the Board of Supervisors of the county of San Diege, State of California, to be held on the second day of February, 1891, at ten o'clock A.M., at the Court House, in the City of San Diego, in said county, there will be presented to the said board a petition for the organization of the Fallbrook Irrigation District, which said petition is in the words and figures following, to-wit:"

I am informed that immediately following the notice the petition was published, including the signa-

ture thereto, but no signature appeared other than the signature to the *petition.*

The notice was not signed either before the beginning of the petition or after its end.

VII.

There is a difference between a case where no notice at all is given, and a case where some notice is given, though not what the statute requires. Very different results follow in the one case from those that follow in the other.

As already shown, the notice that was actually given in this case, assuming it to have been defective, was nevertheless *effective*, as much so, as though there had been no defect whatever.

Now let us assume that there was no question involved here as to innocent purchaser of commercial paper. Let us assume it was simply a question between the district on the one side and the tax payers on the other. Nevertheless, the Board of Supervisors had full jurisdiction of the subject matter of establishing irrigation districts. So had a Board of Commissioners in Indiana full jurisdiction of the subject matter of establishing drainage districts. The Indiana statute required that before the Board of Commissioners could establish a district, a petition of a given number of the land owners thereof, had to be signed, and a notice of the hearing of such petition before the commissioners was to be published for four weeks. As a

matter of fact, in one of the cases where the petition was signed, the notice was not given in accordance with the statute, that is to say, it was given for less time than four weeks.

The ditch was built and thereupon an assessment was levied by the Board of Commissioners for its payment. One of the tax payers objected on the ground, that the district had never been legally formed, by reason of the notice of the hearing of the petition for the formation of the district not having been given as required by law.

Upon this proposition the Supreme Court of Indiana decided as follows:

"It affirmatively appears from the complaint, that the notice was published for twenty-seven days, one day less than the time required by the statute. The act of 1875 requires that notice of the pendency of the petition shall be published for four consecutive weeks, and appellant is correct in his contention that the notice is defective, although lacking only one day of the prescribed time. It is undoubtedly true that, where the statute commands that notice shall be given for a definite time, a notice published for a shorter period is defective, although it fall very little short of the time designated. The difficulty in the case in hand is not in determining whether the notice was such as the statute requires, that is plain enough, but the difficulty is in determining whether the defect in the notice rendered the whole proceedings void. If they were void they are vulnerable upon a collateral attack; if not void, but merely irregular or erroneous, then they can not be overthrown by such an attack.

The difficult question is: Did the defect in the no-

tice render the proceedings void? The board of commissioners had jurisdiction of the subject matter" (so did the board of supervisors have jurisdiction of the subject matter of establishing irrigation districts),"and there was *some* notice, but not *such* a notice as the statute requires. *It is important to keep in mind the fact that there was some notice, although a defective one.* It will not do to assume that there was no notice *at all*, for the reverse is true. It is also true that the commissioners had authority to determine whether they had acquired jurisdiction; *this we think would be so independently of any express statutory provision*; but there is here an express provision requiring the commissioners to determine all preliminary questions. Section 4 of the act provides that 'Said board of commissioners, at the time set for the hearing of said petition, shall, if they find the provisions of the second section of this act to have been complied with, proceed to hear said petition.' The second section contains, among others, provision as to what notice shall be given, and the board must, therefore, in all cases, determine whether the requirement of the statute, concerning notice, had been complied with before entering upon the hearing of the petition. All questions respecting the sufficiency of the notice are thus expressly submitted to the judgment and decision of the board. Whether there was or was not notice, was, of course, a jurisdictional question, and this question having been considered and determined by the commissioners' court, that decision cannot be subjected to review or overthrow by a collateral attack, such as the present. The Board, etc., v. Hall, 70 Ind., 469; Brocaw v. The Board, etc., 73 Ind., 543.

The complaint affirmatively shows that notice was published, but not for the full time required by statute. There was, therefore, a jurisdictional question presented for decision, and upon it a decision was made.

There is a clear distinction between cases in which there is ***no notice whatever***, and those in which there is merely a ***defective*** or ***irregular*** notice. The general rule upon this subject, deducible from the authorities, may be thus stated: If a court, having jurisdiction of the ***subject matter***, and required to determine all jurisdictional questions, either expressly ***or impliedly***, adjudges that notice ***was*** given, its decision will repel a ***collateral attack***, unless the record of the court ***affirmatively*** shows that no notice was given; ***and this is so although the record shows a defective and irregular notice.*** Isaacs v. Price, 2 Dillon. C C., 347; Harrington v. Woffard, 46 Miss., 31; Ballinger v. Tarbell, 16 Iowa, 491; Cooper v. Sunderland, 3 Iowa, 114; Thompson v. Tolmie, 2 Pet., 157."

Muncey vs. Joest, Treasurer, et al., 74 Ind., 411-413.

If the law laid down in the above case and in the authorities therein cited is good law, and it is submitted that beyond all question it *is* good law, how much more should it be applied in a case where the rights of ***bona fide*** purchasers of negotiable paper are involved, and especially where the taxpayers and the district, by silence and also by affirmative action in paying taxes and therewith paying the interest on those bonds, have induced the purchase of those bonds by the innocent purchasers.

VIII.

The decree of confirmation settled the proposition as against the world that this district was legally organized. Such decree does not deprive the land owners of their property without due process of law.

The object of this law has already been stated. It was to settle, once and for all, the question as to the validity of the bonds that were to be issued. It has already been stated that capital is timid. In order to get the best possible price for these bonds there must be no question concerning their validity.

"Capitalists could not be expected to accept such paper and advance money for it, *unless the authority to issue it was put beyond dispute.*"

Bissell vs. City of Jeffersonville, 24 Howard, 298.

Such being the stubborn fact of the case, the legislature and the people of this State were confronted with the problem as to what plan could be devised and what proceeding could be instituted which, in the language just quoted would "put beyond dispute" the authority to issue the bonds.

It is true that the Supreme Court of the United States had, in numerous cases, stated that it was within the province of the law to authorize some person, such as an auditor, commissioner, or other officer, "to examine the proceedings and make his certificate of legality *conclusive* evidence thereof" or that it might "permit the district to appeal to the Court for a like determination."

Tregea vs. Modesto Irrigation District, 164 U. S., 179.

These certificates were *ex parte*, but nevertheless, as we have seen, would bind the taxpayers of the dis-

trict, even in cases where they recited an election had been held which in fact had never taken place; but the legislature of California determined to provide a proceeding where everyone would have a chance to be heard upon that proposition. In consequence the act of 1889, referred to in the last named case, was passed by the legislature of California. In the Tregea case, it was stated that if the Court was appealed to, the proceeding was simply to secure evidence. It is true it said that *such* evidence would be *conclusive* evidence of the fact; so that, whether this proceeding is to be considered as a mere matter of conclusive evidence or as a decree *in rem* would seem to cut no figure.

The Supreme Court of California, however, (even since that decision) has invariably held the proceedings to be *in rem*, and to such an extent has this been held that, in the most recent expressions of the Court, it was determined that the proceeding bound the *State* as well as any private individual. In fact, we have already seen that, so far as the point raised in this case is concerned, as to the legal organization of the district, that fact was already determined as to private individuals, by reason of the district being a *de facto* corporation.

People vs. Linda Vista Irrigation District, 128 Cal., 485.

As we have just said the Supreme Court of California has always held, even since the Tregea case was decided in this Court, that these confirmation pro-

ceedings were proceedings *in rem*.

People vs. Linda Vista Irrigation District, 128 Cal., 377.477

People vs. Perris Irrigation District, 132 Cal., 289, 292.

The last case appears in the very last volume of the California reports, and it was decided in March, 1901.

Both the last named cases are *quo warranto* cases, and it was there held that the decree of confirmation bound the *State* as well as the rest of the world and hence *quo warranto* would not lie for the very alleged defect that is claimed in this case, namely, that the notice was not signed.

It would be extraordinary indeed, and a travesty upon justice, if the existence of these corporations could not be questioned by *quo warranto* by the *State*, and yet could be declared void in a collateral suit at the instance of any *private* party who might chose to make the attack.

The chief objection of counsel to the validity of the decree of confirmation is that it would be depriving the land owner of his property without due process of law, because no process was served upon him *personally* but only by publication. The complete answer to that proposition is fully demonstrated, where that very point was raised in the Supreme Court of California.

"Nor is it *pretended* that the appellant did not have

notice of the confirmation proceedings or that he was in any way or for any reason prevented from appearing therein and raising all the objections which he now seeks to raise."

(The notice in that case was not signed, and it will be observed that what I have been urging is true, namely, that at that time, which was in 1890, no one dreamed of thinking these notices were not entirely legal)

"The contention is simply that no process issued in those proceedings was served on him *personally*, and hence that he was not obliged to appear and his rights are not barred by the judgment, but he is at liberty now to make any attack upon the proceedings for the issue of the bonds, *including the proceedings for the organization of the district* that he could have made, had there been no judgment or confirmation. To hold otherwise, it is claimed, would have the effect of depriving him of his property without due process of law."

Crall vs. Poso Irrigation Distaict, 87 Cal., 146.

The Court will see, therefore, that the question was squarely before the Supreme Court of the State of California.

In a most masterly opinion, which amounts to absolute demonstration, the Court then proceeded to demonstrate that a published notice is sufficient process of law. As there pointed out, millions of dollars are determined by probate proceedings which depend exclusively upon *published* notices. Street assessments, insolvency proceedings, tax proceedings and many other analogous cases were referred to where published notice alone was given.

It is astonishing to me that the case referred to so much by counsel's brief, did not convince him that there can be nothing in this point. It is conceded that, if the notice of the hearing of the petition to the Supervisors *for organization* had been *signed*, then this district would have been legally organized, and there would have been no need of a decree of confirmation. Yet that notice was not a process served upon each land owner individually, *but was published only*. The Supreme Court of the United States held that *such* a notice *was due process of law*.

Fallbrook Irrigation District vs. Bradley, 164, U. S., 112.

The effect of a *published* notice of the petition for *organization* would be, according to the theory of counsel, and of that decision, to render the lands of the taxpayer liable for the payment of whatever taxes might be necessary to pay any indebtedness that should be incurred by the district thereby organized; such *published* notice of the *organization* proceedings would give each land owner his day in Court, as to every question that has been suggested by counsel, or which could be suggested by him. He concedes, and the Fallbrook case decides that all those questions would have been settled once and forever, by his having had due process of law by reason of such *published* notice, always supposing that notice to be in accordance with the requirements of the statute. How, then, can counsel claim, with both the authorities of the State and the United States staring him in the face, that the *published* notice of these *confirmation* proceedings

is depriving his clients of their property without due process of law, when those authorities, both State and Federal, conclusively establish the proposition that a *published* notice in the *organization* proceedings would finally and forever make his land liable for these bonds and would settle every question against him which he now makes?

Counsel further objects that it is impossible for one to have his rights recited away upon jurisdictional facts. But under point V of this brief we have shown, by the citation of many authorities (and many more might be cited), that that point is not tenable where the rights of a *bona fide* purchaser have accrued on the faith of that recital.

Notices of an election are as essential to the protection of a tax payer as are notices of the presentation of a petition for the organization of the district. Yet, in favor of a *bona fide* purchaser, a certificate that an election had been held will protect the innocent purchaser of those bonds, even if that recital be false. Even where an officer makes a false recital of service of summons, and judgment is entered thereon, the title of an *innocent purchaser* under that judgment cannot be disturbed, by showing that there was, in fact, no service. This is shown in the case of Reeve vs. Kennedy, and many other cases cited under said point V, including cases in this Court.

In fact, this rule has never been doubted in a single case which had fallen under my observation.

Counsel's further objection that these confirmation

proceedings are not proceedings *in rem* is fully answered by the decision of the Supreme Court of California.

People vs. Linda Vista Irrigation District, 128 Cal. 477, and cases cited.

People vs. Perris Irrigation Dist., 132 Cal., 292.

Nor can I appreciate the reasoning of counsel why this is not a proper subject for a proceeding *in rem*. The statute contemplated that the proceedings would deal with large bodies of land, the owners of some of the respective parcels of which would or might be in doubt or unknown. These districts generally have several hundred owners or claimants, each of a separate parcel. This district had over four hundred, as shown by the vote on organization. Yet to make such a decree effectual, to accomplish the purpose for which it was intended, it must bind *every foot* of land within the district. In such a case it is eminently proper that the proceeding should be *in rem* to determine the status of this body of land and bind everyone who claimed any part of it. No *practical* proceeding could be imagined, or devised, which would accomplish the purposes intended, except a proceeding *in rem*.

But as has been observed, whether the culmination of these proceedings is a judicial decree or only conclusive evidence, amounts to no practical difference. The result is practically the same.

The objection made by counsel that the confirmation proceedings are also objectionable to the Fourteenth Amendment of the Constitution of the United States, on the ground of discriminating legislation, has no force. The discrimination was not arbitrary, but was an actual necessity. It was based upon the natural differences that existed betweeen these districts and any other organizations in the State. The object of the law, as stated by the Supreme Court in many cases, was that the validity of the organization of those districts and the proceedings thereunder should be settled, in order that their bonds should bring the highest possible price.

"It is a matter of every day observation that bonds bearing such a rate of interest, and about whose validity and payment at maturity there is no question, can be readily sold for considerably more than their face value, while bonds which are liable to be assailed and questioned, years after their issue, by anyone who is required to contribute to their payment, are reluctantly taken at any price. It was doubtless for the purpose of settling all these matters in advance, and thereby making the bonds of irrigation districts more readily salable, and at better prices than they would otherwise command, that the legislature passed the confirmation act, providing that the districts might, before offering any of their bonds for sale, have all questions affecting their validity judicially and finally determined."

Crall vs. Poso Irrigation District, 87 Cal., 145-6.

Now, if there was any other organization in the State of California organized under such a law as

these irrigation districts were organized under, or that needed its proceedings or its bonds to be examined, determined and confirmed, it has not been mentioned or pointed out; and I am aware of none. If there be none, then that there is a valid distinction for this law, not an *arbitrary* classification merely, is beyond question.

The objection to the decree of confirmation on the ground that notice therein was not properly made, is untenable. The statute says:

"The Court shall *find* and *determine* whether the notice of the filing of said petition has been duly given and published for the time, and in the manner in this act prescribed."

This requirement was not for an idle and useless purpose. It was evidently meant to *conclude* that matter. It was evidently intended by the statute, that such a finding and determination should *establish* that the required notice had been given. Acting in pursuance of this requirement of the statute, the Court did proceed to find and determine whether or not there had been such notice given. Now it is manifest that before the Court could put in written words, that it "found" the fact to exist, it must first "determine" that such fact did exist. Without such determination being first made, that the fact did exist, how could it be "found" to exist?

But the Court states in so many words, both in its findings and in its decree, that such notice had been given.

The criticism that the record showed that Oakford posted the notices, and that he was not the clerk, is not entitled to any consideration. The clerk gives the notice when it is signed by him and is posted and published by anyone with his assent, no difference by whom. Is it contended that the clerk did not publish the notice (for he must *publish* as well as *post*) because he did not own the newspaper that published it? It is not expected that the clerk go in person all over the district, posting notices, any more than it is for him to own a newspaper in which to publish it. The law requires him to remain in his office to attend to his duties there. He may be sick, and could not go if he wanted to. Oakford's affidavit, if it had any place in the record at all, (which it had not, Sargent in Bank, 12 How.,384–5, England vs. Gebhardt 112 U.S. 505,), does not in any way contradict the finding and determination of the Court, that the notice was given as required by law. Oakford may have posted the notice at the request or with the assent of the clerk, as much as the newspaper published the same at his request or with his assent. He certainly does not say that he did not, and all intendments are in favor of the judgment, even if the Court was acting with limited power in this proceeding, as claimed by counsel.

Estate of Twombly, 120 Cal., 351.

There is no particular kind of evidence, as to being written or oral, which the Court must act upon in making its determination and finding. Oakford may have been *sworn on the hearing and testified orally* that he posted the notices *at the request of the clerk. On that*

oral evidence, the Court may have reached its determination, and made its finding. It will not (because it cannot) be denied that the *minutes do* show that Oakford, the clerk of the Court, and others, *were sworn and testified on the hearing.* Be that as it may, *the finding and determination of the Court* that notice was duly given, was intended to be and is binding and conclusive in favor of *bona fide* purchasers of bonds.

"Where the jurisdiction of even an inferior Court is dependant on a *fact* which the Court is required to ascertain and settle by its decision, such decision is held conclusive."

Farmers' Bank v. Board, 97 Cal., 328.

People v. Reclamation District, 121 Cal., 525.

IX.

The second judgment entered in the confirmation proceedings eight years after the confirmation decree had become final, cuts no figure as against bona fide purchasers of bonds.

The Court is respectfully referred to the statement of the case at the beginning of this brief for the facts as to the general decree.

The opinion of the Court in the last alleged proceeding *(offered in evidence by the plaintiffs in error themselves)* reads as follows:

"Heretofore a decree of confirmation in such proceedings has been made and entered herein and subsequent to such decree being entered, on complaint of

Jauchius and others, such decree was vacated and set aside. That matter was presented to the Court on demurrer to complaint, which demurrer was submitted to the Court *without argument* and *at once* overruled, in accordance with a well established *rule* of this Court to overrule all demurrers that are submitted without argument.

No answer was made to the complaint and the petitioners took the relief asked for *by default* and the decree of confirmation was set aside by the order of the Court."

It is submitted to the Court whether such procedure *as recited by the judge himself*, does not justify the remarks made in a case in the House of Lords, the highest Court in England, and quoted by a leading authority on judgments in this country, namely:

"But to create an estoppel it is essentially necessary there be a genuine and honest judgment. It must not be merely collusive or simulated. A judgment or sentence, we are told, is a judicial determination of a case agitated between *real* parties upon which a *real* interest has been settled. In order to make a sentence there must be a real *interest*, a real *argument*, a real *prosecution*, a real *defense*, a real *decision*.

In all these requisites, not one takes place in case of a fraudulent or collusive suit. There is no judge; but a person invested with the insignia of a judicial office is misemployed in listening to a fictitious cause proposed to him. There is no party *litigating*; there is no party defendant; no real interest brought into question."

Earl of Brandon vs. Becher, 3 Cl. & F., 510.

2 Black Judgments, sec. 508.

The cases cited by the counsel to the effect that a second decree in a case would be taken to be valid in the absence of a contrary showing, were all cases where the first decree had not become final when the second decree was entered.

In California the statute reads as follows:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

Code of Civil Procedure, Sec. 1049.

See also Peeney vs. Hinckley, 66 Pac. Rep., 580.

The time for appeal in California from ordinary judgments is one year.

When a decree *becomes final*, however, as was the case here, the Court has no power to set aside a judgment. The case then falls within the rule laid down in a late case decided by the Supreme Court of California, which reads as follows:

"When a judgment is once entered of record, it must stand as the judgment until it is vacated, modified or disposed of by some means provided by law: *entering additional judgment entries is not one of them.*"

Estate of Mitchell, 126 Cal., 250.

The second judgment was therefore a mere nullity.

Even if it were not, it could not affect existing *bona fide* purchasers.

Hutchinson vs. Burr, 12 Cal., 103.

Patterson vs. Yuba Co., 12 Cal., 105.

Brown vs. Trousdale, 138 U. S., 389.

Carroll vs. Smith, 111 U. S., 562.

Tregea vs. Irr. Dist. 164 U. S., 179.

Herring vs. Modesto Irr. Dist., 95 Fed., 722.

Miller vs. Perris Irr. Dist., 99 Fed., 143, 150.

Thompson vs. Sampson, 64 Cal., 330.

The first judgment is still in full force as to existing *bona fide* purchasers, as they were not made parties to any action to set it aside.

New Orleans Water Works Co. vs. New Orleans, 164 U. S., 471.

Patterson vs. Supervisors, 12 Cal., 106.

Cattle Co. v. Frank, 148 U. S., ~~604~~ 603

Consolidated Water Co. v. Babcock, 76 Fed., 252.

Consolidated Water Co. v. Babcock 93 Fed., 849.

Hassel v. Wilcox, 130 U. S., 503.

Louisville Trust Co. v. Cincinnati, 76 Fed., 298–9.

People v. Temple, 103 Cal., 453.

Stallcup v. City of Tacoma, 42 Pac. Rep., 544–5.

Hoppock v. Chambers, 56 N. W., 86.

X.

The two years statute of limitations in which a district could be attacked is a bar to any attack now made.

The statutes of California, 1891, page 144, which is an amendment of the Wright law, provided as follows:

"And no action shall be commenced or maintained or defense made affecting the validity of the organization, unless the same shall have been commenced or made within two years after making and entering of said order."

The constitutionality of this Act is attacked by the counsel. I cannot understand wherein it is unconstitutional. The statute of limitations varies with reference to almost everything dealt with, and certainly the matter is entirely within the discretion of the legislature.

It is claimed that because the defendants are in possession of all their rights concerning their lands, therefore, they cannot constitutionally be called upon to do anything. But it was held by the Supreme Court of the United States that a law of Congress was perfectly valid that called upon all claimants of Mexican grants to present their claims to the land commissioners within three years after the passage of a Congressional act, requiring them to do so, or forfeit their lands: and this, too, even though the title was already perfect.

Botiller v. Dominques, 130 U. S., 238, 52.

That was not as strong a case as this, because there

the claimant of the land was enjoying the land in full without paying anything to anybody; but in this case a man can hardly be said to be in the full possession of all his rights as to his lands when he is paying the district its levies of taxes upon them. All that is asked is that he *continue* to pay the very levies that he was paying during those two years.

There is another theory on which this limitation law may well rest. It was determined in the Fallbrook case that the legislature *could itself* have organized the district without any notice to anyone. It is true that in that case it would be presumed to have taken *evidence*; but it might well be said that it has taken evidence when, for two years, people acquiesced in the validity of the district and its proper organization by paying taxes levied by that district. What better evidence could the legislature take that lands were properly includible in a district, when the owners of those lands, for two years, paid the taxes which were levied by the district upon them, without making any attack upon the district itself? May not, therefore, it be well said that the legislature was satisfied that the fact that no attack upon the district had been made for two years (by those who were meeting its burdens), was sufficient evidence on which it could act to *ratify* those districts, which it might have created in the first instance without notice, and upon no stronger or more convincing evidence?

In this veiw of the case, this statute becomes a *ratification* of the organization of these districts; and the evidence under which the legislature acts in thus rati-

fying those organizations, is the fact that the owners of the land have submitted, without action or attack upon the district, to the burden of paying the taxes levied by the district upon them.

But, if possible, a still more conclusive ground on which the statute can rest, is the fact that, as seen by the authorities cited in former points of this brief, a tax payer must not rest supine, but must resort to judicial redress when he sees his property about to be subjected to burdens of taxation for the payment of claims being created illegally, *when the rights of innocent purchasers are about to intervene.* The authorities do not state the precise time in which a taxpayer must seek "judicial redress" to restrain or nullify the threatened acts. Many of them, as will be seen, use the expression that he must seek such redress "promptly." It is entirely within the power of the legislature to fix a precise limit as to the time in which the party must seek his judicial redress as against irrigation districts. The statute, in its wisdom, stated that such redress must be sought, and sought for within two years, or not doing so, that fact should be deemed an acquiescence in the existence of the district by the taxpayers therein.

The act, as to the two years limitation, was fully upheld in the Circuit Court of the United States for California.

Miller vs. Perris Irr. Dist., 85 Fed., 702.

Herring vs. Modesto Irr. Dist. 95 Fed., 721–2.

XI.

The two years statute of limitations was not affected by the Bridgeford Bill, so called.

The Bridgeford Bill (statutes of 1897, p. 254) is not inconsistent with the two years statute of limitations in statutes of 1891, p. 144, for it has no provision on the subject of limitation whatever, and therefore, cannot be deemed to have taken the place of such provision in the previous law. Besides, it, by clear assumption, keeps that provision in force, for it says that the previous laws are only repealed "*so far* as they may be *inconsistent* herewith." This clearly assumes that there is *something* in those previous laws that is *not* repealed; and that something is expressly stated to be that part of them which is not *inconsistent* with the law. The two year limitation is in no way inconsistent with the last law, it having no provision whatever on that subject, and hence is still in force.

Besides, limitation laws, when once fully run, become part of the right, and their repeal does not open up the time for litigating these rights, where these rights exist *in property*, as they do in these bonds.

Peiser vs. Griffin, 125 Cal., 9.

Board vs. Blodgett, 40 N. E., 1026–7.

Campbell vs. Holt, 115 U. S., 623.

In fact, this law was something more than a statute of limitations. When the State said to intending purchasers of bonds, "The organization of the district,

whose bonds you may buy, shall not be attacked after two years, after that time they shall be unassailable and the district sold its bonds while this law was in force, *the law became a part of the contract itself*, and its repeal could no more affect the contract of which it was a part, than would the repeal of the whole statute authorizing the formation of the district.

Walker vs. Whitehead 16 Wall, 314.

Barnitz vs. Beverly, 163 U. S., [illegible]

Allen vs. Allen, 95 Cal., 197.

Moreover, as pointed out by Judge Morrow, section 9 of the Bridgeford bill expressly saves this provision.

Herring v. Modesto Irr. Dist., 95 Fed., 722.

XII.

And finally,

We have here a case where there is a valid law under which corporations organized thereunder *can* issue bonds. We have a case where the Tulare Irrigation District purported to organize under that law. and which, for many years after its organization acted in the best of faith as though a legal corporation, to the very fullest extent, issuing bonds, levying and collecting taxes, paying the interest promptly on its bonds, building canals, irrigating lands in the district, litigating as a corporation in the Courts, being there recognized as a corporation, in fact doing every possible act which a legal corporation could do; all this with-

out a question or objection from anyone, as to the entire validity of the corporation and its bonds. Nay, more: We have a solemn decree of confirmation by a Court of competent jurisdiction declaring both corporation and bonds to be entirely legal. And still more: We have a law that requires the bonds to be negotiable in form and to "express on their face that they were issued by *authority* of this act," the effect of which recital under the numerous decisions of the Supreme Court of the United States was then well known to the legislature to be to make them, when in the hands of innocent purchasers, unassailable as to any claim that could be made that any prior act necessary to their entire validity had not been performed; and the legislature, knowing that this recital would have this effect, must, from the fact of requiring it to be inserted, have intended it to have that effect.

Notwithstanding all this, the learned counsel insists that the district and its taxpayers are entitled to examine every i to see if it is dotted and every t to see if it is crossed.

Is it too much to claim that this district and its taxpayers shall not thus obtain our money, enjoy the property they have purchased with it, and not pay the bonds which they sold us, and which we purchased in the utmost good faith.

We earnestly submit that this case should be affirmed upon each of the points hereinbefore stated; and we further submit with equal earnestness, that, if the principles for which we contend shall not be as

fully sustained by this Court in the future as they have been in the past, then the sale of negotiable municipal securities must immediately come to an end. A reversal of this case would be their death blow. No municipality in the United States could ever, thereafter, borrow a dollar, except at a discount which would be ruinous.

All of which is respectfully submitted.

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